

SERVED: October 2, 1992

NTSB Order No. EA-3681

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 21st day of September, 1992

THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10807
v.)	
)	
ARIE C. BAKKER,)	
)	
Respondent.)	
)	

OPINION AND ORDER

The respondent has appealed from an order issued by Administrative Law Judge Joyce Capps which granted a motion by the Administrator to dismiss as untimely the appeal respondent filed in this proceeding to contest the revocation of his airline transport pilot certificate.¹ For the reasons discussed below,

¹A copy of the law judge's order, served May 15, 1990, is attached.

we will deny the appeal and affirm the dismissal order.²

On November 28, 1989, the Administrator issued an order revoking respondent's airline transport pilot certificate.³ The order was mailed to respondent by certified mail on that date. According to the markings on the envelope, the post office served notice to respondent on December 2, 1989 and December 8, 1989. The mail was never retrieved by respondent. On December 17, 1989, it was returned to sender, marked "unclaimed." The returned order was received in the FAA's Office of the Assistant Chief Counsel for the Southern Region on December 27, 1989. According to a handwritten note on the envelope, it was remailed by regular mail on January 1, 1990. See Administrator's Exhibit A-1.⁴

The Administrator produced evidence that on November 28, 1989, respondent's address on record in the Airman Certification Branch in Oklahoma City was in fact the address to which the order was sent. On December 8, 1989, respondent notified Oklahoma City of a new address. See Administrator's Exhibit A-

²The Administrator has filed a reply opposing the appeal.

³The order alleged that respondent operated an aircraft when it did not have a current airworthiness certificate or registration certificate, when it was not in an airworthy condition and when it had been issued an aircraft condition notice, violations of FAR §§ 91.27, 91.29, and 91.9. The order further stated that respondent has a previous violation history including another revocation and two suspensions.

⁴FAA counsel indicated to the law judge that respondent did not receive the order which was mailed by regular mail (TR-22), although at the time the FAA filed the motion to dismiss, the FAA attorney who had previously handled the case indicated that it had not been returned.

2.⁵

At the end of January, 1990, respondent was involved in an aircraft accident. During the course of the investigation into that incident, FAA inspectors determined that respondent's certificate had been revoked. Respondent was informed, and he contacted FAA counsel. On January 26, 1990, FAA counsel wrote to respondent, confirming that his certificate had been revoked effective December 11, 1989, and that he had been ordered to surrender his certificate on that date. The letter reminds respondent that he is subject to a civil penalty in the event he operates an aircraft during the period of revocation.⁶ Copies of all previous correspondence were also provided. See Respondent's Exhibit R-1. Respondent filed a notice of appeal of the revocation order on February 10, 1990. The law judge ruled that there had been valid constructive service of the Administrator's order on respondent in November, and dismissed his appeal as untimely.

Respondent, who was represented at the hearing by counsel but who has filed his appeal brief pro se, asserts that the law judge erred in dismissing his appeal. We cannot agree. The Board has previously found that service by certified mail,

⁵On January 26, 1990, respondent apparently used a third address in the same city, and his appeal brief now indicates a fourth address in that city.

⁶Although the FAA's letter clearly indicates that the FAA considered the time to appeal as expired, respondent argued to the law judge that the letter constituted actual notice and should be treated as an extension of time for his appeal.

returned unclaimed, can be considered constructive service. See e.g., Administrator v. Hamilton, NTSB Order No. EA-2743 at 8 (1988). We recently noted in Administrator v. Coombs, NTSB Order No. EA-3609 at 4 (July 10, 1992) that the Administrator's evidence that an order has been sent by certified mail to the airman's correct address of record but returned by the Post Office as unclaimed is "...more than sufficient to create at least a rebuttable presumption that respondent had neglected to collect his certified mail despite the Postal Service's... efforts to deliver it or apprise him of its existence. Consistent with this analysis of the matter, the dispositive question, at least as to the adequacy of service of the certified copy of the revocation order on respondent, becomes whether the respondent successfully demonstrated that he had not received any notices concerning the certified mail he did not claim."

Following the law judge's rendering of the oral initial decision, respondent claimed for the first time⁷ that he received only one notice from the post office, on or about December 8, 1989, and that it had been incorrectly addressed to a neighbor's home. When he attempted to collect the certified mail at the post office, he claims he was told that they could not find the letter. He then left the country on or about December 17, 1989.

⁷Respondent makes absolutely no mention of these claims in his response to the Administrator's Motion to Dismiss, contained in the Board's file, even though the Administrator stated in the motion that there was effective constructive service because the certified mail had been returned marked "unclaimed."

(TR-31).⁸

In the Board's view, respondent fails to rebut the presumption that the Administrator effected valid constructive service of the revocation order by certified mail in November, 1989. When respondent's unsubstantiated claims, that the one notice he received was improperly addressed, and that when he asked for the letter at the post office he was told they could not find it, are considered together with his claims that he never received the first notice from the post office and the NOPCA and the letter of investigation, we are compelled to conclude, as we similarly concluded in Coombs, EA-3609 at 7, that respondent's tardiness in filing an appeal with the Board was either the direct result of his lack of diligence or the product of a mistaken judgment that avoiding or eluding information might somehow benefit him. Respondent has offered us no persuasive reason which would justify accepting his notice of appeal out of time.

⁸Respondent also claims in his Notice of Appeal that he did not receive the Notice of Proposed Certificate Action (NOPCA) or a letter of investigation until they were both forwarded to him as enclosures with FAA counsel's January 26, 1990 letter. They were also mailed by certified mail to respondent's correct address of record, according to documents contained in the Board's file.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and
2. The law judge's order dismissing respondent's appeal is affirmed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.